

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

\* \* \*

SAUL CLAROS, )  
Plaintiff, )  
vs. )  
LANDAMERICA ONESTOP, INC.; )  
MORTGAGE ELECTRONIC )  
REGISTRATION SYSTEMS; METLIFE )  
HOME LOANS; FIRST HORIZON HOME )  
LOANS CORPORATION; UTLS NATIONAL )  
DEFAULT SERVICES, LLC; S.B. )  
MANAGEMENT, LLC, David Zepeda, Trustee )  
of the David Rose, Chris Rose, Sam Kirby, Irv )  
Kirby, Jack, Cad, Lydia Cadman, Kenneth )  
Gilbert, Fran Gilbert Trust, W.J. Bradley, Frank )  
Ruualcaba; Bonnie Mac, Individually; Federal )  
National Mortgage Association UNKNOWN )  
BENEFICIARIES/SUCCESSORS AND/OR )  
PREDECESSORS *an ens legis being used to* )  
*conceal fraud, AND JOHN DOES* )  
INVESTORS 1-50, et. al., )  
Defendants. )  
)  
Case No.: 2:10-cv-1788-RLH-PAL  
***NUNC PRO TUNC CORRECTION***  
**OF ORDER #48**  
(Motion to Dismiss #10;  
Motion to Dismiss #21;  
Motion to Dismiss #38)

On March 24, 2011, this Court entered an Order (#48) granting three motions to dismiss (##10, 21, 38). The Court is now aware of an inadvertent error in that Order and issues this *nunc pro tunc* correction order for the limited purpose of making the record reflect what the Court did not sufficiently express in the original order. *See In re Warren*, 568 F.3d 1113, 1116 n.1

1 (9th Cir. 2009). Specifically, that Defendant UTLS National Default Services, LLC joined  
 2 Defendant Mortgage Electronic Registration Systems, Inc.'s Motion to Dismiss (#10).

3 \* \* \*

4 Before the Court is Defendant Mortgage Electronic Registration Systems, Inc.'s  
 5 ("MERS") **Motion to Dismiss** (#10, filed Nov. 10, 2010) for failure to state a claim. The Court  
 6 has also considered Plaintiff Saul Claros' Opposition (#18, filed Nov. 18, 2010), and MERS'  
 7 Reply (#25, filed Nov. 29, 2010). Defendant UTLS National Default Services, LLC has joined  
 8 MERS' Motion to Dismiss (#10) and Reply (#25).

9 Also, before the Court is Defendants Federal National Mortgage Association  
 10 ("Fannie Mae") and Lender Business Process Services' ("LBPS") **Motion to Dismiss** (#21, filed  
 11 Nov. 22, 2010) for failure to state a claim. The Court has also considered Claros' Opposition  
 12 (#28, filed Nov. 30, 2010), and Fannie Mae and LBPS' Reply (#37, filed Dec. 10, 2010).

13 Finally, before the Court is Defendants MetLife Bank, N.A. ("MetLife") and First  
 14 Horizon Home Loans Corporation's ("First Horizon") **Motion to Dismiss** (#38, Dec. 27, 2010) for  
 15 failure to state a claim. Claros did not file an opposition.

## 16 BACKGROUND

17 In November 2004, Claros refinanced his home located in Las Vegas. The deed of  
 18 trust for the refinanced mortgage loan named First Horizon as the lender, Fidelity National Title as  
 19 the trustee, and MERS as the beneficiary. In late 2008 or early 2009, Claros defaulted on this loan  
 20 and Defendant LandAmerica Onestop, Inc., acting as agent for MERS, issued a notice of default.  
 21 Claros subsequently hired Defendant S.B. Management, a California company, to assist him in  
 22 modifying the loan or to stop the pending foreclosure. Specifically, Claros alleges that S.B.  
 23 Management promised to pay off the refinanced loan and accept monthly payments from Claros  
 24 until the debt was paid in full. However, S.B. Management allegedly never followed through on  
 25 that promise.

26 ///

1           Then in February 2010, MERS transferred all beneficial interest under the deed of  
 2 trust to MetLife. MetLife then substituted Defendant UTLS Default Services (“UTLS”) as the  
 3 trustee under the deed of trust and on April 15, UTLS recorded a notice of trustee sale.  
 4 Accordingly, on June 17, UTLS sold Claros’ home to MetLife at a trustee sale. Metlife  
 5 subsequently transferred the property to Fannie Mae, which currently holds legal title to the home.

6           On October 14, 2010, Claros filed a complaint asserting two claims under the Truth  
 7 in Lending Act (“TILA”), 15 U.S.C. § 1601, *et seq.*, one claim under NRS § 107.080, and one  
 8 wrongful foreclosure claim. Each claim appears to have been asserted against each Defendant.  
 9 Defendants MERS, UTLS, Fannie Mae, LBPS, MetLife, and First Horizon subsequently filed  
 10 motions to dismiss. For the reasons discussed below, the Court grants Defendants’ motions.

## 11           DISCUSSION

### 12           I.       Standard of Review

13           A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which  
 14 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “a short  
 15 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.  
 16 8(a)(2). While Rule 8 does not require detailed factual allegations, it demands “more than labels  
 17 and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v.*  
 18 *Iqbal*, 129 S. Ct. 1937, 1949 (2009). “Factual allegations must be enough to rise above the  
 19 speculative level.” *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint  
 20 must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*,  
 21 129 S. Ct. at 1949 (internal citation omitted).

22           In *Iqbal*, the Supreme Court recently clarified the two-step approach district courts  
 23 are to apply when considering motions to dismiss. First, a district court must accept as true all  
 24 well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the  
 25 assumption of truth. *Id.* at 1950. Mere recitals of the elements of a cause of action, supported only  
 26 by conclusory statements, do not suffice. *Id.* at 1949. Second, a district court must consider

1 whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 1950. A  
 2 claim is facially plausible when the plaintiff's complaint alleges facts that allows the court to draw  
 3 a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 1949. Where  
 4 the complaint does not permit the court to infer more than the mere possibility of misconduct, the  
 5 complaint has "alleged—but not shown—that the pleader is entitled to relief." *Id.* (internal  
 6 quotation marks omitted). When the claims in a complaint have not crossed the line from  
 7 conceivable to plausible, plaintiff's complaint must be dismissed. *Twombly*, 550 U.S. at 570.

## 8 II. Analysis

### 9 A. TILA

10 TILA requires creditors to disclose certain information about the terms of a loan to  
 11 the prospective borrower. *See*, 15 U.S.C. §§ 1631–1632, 1638; 12 C.F.R. § 226.17. A creditor  
 12 who fails to comply with TILA's requirements is liable to the borrower for damages. 15 U.S.C.  
 13 § 1640(a). However, damages claims under TILA must be brought within one year from the date  
 14 of the occurrence of the violation (*i.e.*, closing). Furthermore, TILA also provides borrowers with  
 15 the right to rescind a mortgage transaction under certain parameters. 15 U.S.C. § 1635(a).  
 16 However, the borrowers right of rescission must be exercised within three years after the date of the  
 17 consummation of the transaction (*i.e.*, closing) or before the property in question is sold,  
 18 whichever occurs first. 15 U.S.C. § 1635(f). Finally, the remedy of rescission is available only  
 19 where a borrower is willing and able to tender the balance on the promissory note. *Yamamoto v.*  
 20 *Bank of N.Y.*, 329 F.3d 1167, 1173 (9th Cir. 2003).

21 Claros seeks both damages and rescission under TILA. However, the loan in  
 22 question closed in November 2004 and Claros commenced this action in October 2010—more  
 23 than six years later. Therefore, Claros' TILA claim fails under the statute of limitations (his  
 24 damages claim expired in November 2005 and his rescission claim expired in November 2007).  
 25 Claros' TILA claim also fails because he has not alleged that he is willing and able to tender the  
 26

1 remaining balance on his debt. Accordingly, the Court dismisses Claros' first and second causes  
 2 of action.

3                   **B. Wrongful Foreclosure**

4                 “An action for the tort of wrongful foreclosure will lie if the trustor or mortgagor  
 5 can establish that at the time the power of sale was exercised or the foreclosure occurred, no  
 6 breach of condition or failure of performance existed on the mortgagor’s or trustor’s part which  
 7 would have authorized the foreclosure or exercise of the power of sale.” *Collins v. Union Fed.*  
 8 *Sav. & Loan Ass’n*, 662 P.2d 610, 623 (Nev. 1983). Claros’ wrongful foreclosure claim fails  
 9 because at the time of foreclosure he was in breach of the terms of the deed of trust. Therefore, the  
 10 Court dismisses Claros’ third cause of action.

11                   **C. NRS § 107.080**

12                 NRS § 107.080 requires, among other things, the trustee or beneficiary of a deed of  
 13 trust to record a notice of default and election to sell the property subject to the deed of trust before  
 14 that property is sold. Section 107.080(3) further requires the trustee to mail a copy of the notice of  
 15 default and election to sell to the trustor (*i.e.*, the debtor), before the subject property is sold. A  
 16 sale made pursuant to § 107.080 may be declared void if the trustee or beneficiary does not  
 17 substantially comply with these requirements.

18                 Claros alleges that the Defendants violated NRS § 107.080(3) by failing to properly  
 19 notify him of the trustee’s sale. However, as discussed below, the Court takes judicial notice of  
 20 the “Notice of Breach and Default and of Election to Cause Sale of Real Property Under Deed of  
 21 Trust,” which was recorded on April 24, 2009, and substantially complies with NRS § 107.080. In  
 22 addition, Claros does not allege that Defendants failed to mail this document to him. Therefore,  
 23 Claros fails to allege sufficient facts for this claim to be plausible. Accordingly, the Court  
 24 dismisses Claros’ fourth cause of action.

25                 ///

26                 ///

### **III. Judicial Notice**

Pursuant to Rule 201(b) of the Federal Rules of Evidence, a court may take judicial notice of facts that are not subject to reasonable dispute because they are “(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Because the “Notice of Breach and Default and of Election to Cause Sale of Real Property Under Deed of Trust” (Dkt. #10, Ex. F, Mot. to Dis.) was recorded in the office of the Clark County Recorder it is capable of accurate and ready determination. Therefore, the Court takes judicial notice of that document.

## CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that MERS and UTLS' Motion to Dismiss (#10) is GRANTED.

IT IS FURTHER ORDERED that Fannie Mae and LBPS' Motion to Dismiss (#21) is GRANTED.

IT IS FURTHER ORDERED that MetLife and First Horizon's Motion to Dismiss (#38) is GRANTED.

Claros' claims are dismissed as to all Defendants and the Clerk of Court is instructed to close the case.

Dated: April 13, 2011

  
**ROGER L. HUNT**  
Chief United States District Judge